

600 KAR 4:010. Certification of disadvantaged business enterprises.

RELATES TO: KRS 96A.090, 176.080, 176.100, 176.110, 176.130, 176.140, 176.150, 176.240, 177.410, 183.120, 183.130, 183.137, 183.160, 13 C.F.R. 121.201, 40 C.F.R. Parts 23, 26, 15 U.S.C. 637(a), (d), (m)

STATUTORY AUTHORITY: KRS 174.080, 49 C.F.R. 26.3, 26.21

NECESSITY, FUNCTION, AND CONFORMITY: 49 C.F.R. 26.3 and 26.21 requires that recipients of federal-aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21) from the United States Department of Transportation (USDOT) implement a program to ensure nondiscrimination in the award and administration of USDOT-assisted contracts in its highway financial assistance programs. The Kentucky Transportation Cabinet, as a recipient of these funds, is required by 49 C.F.R. 26.21 to have a program that requires the participation of disadvantaged, minority and women business enterprises in contracts financed in whole or in part with these funds. This administrative regulation establishes the requirements for certification of DBE firms.

Section 1. Definitions. (1) "Applicant" or "firm" means any corporation, partnership, sole proprietorship, or joint venture applying with the Transportation Cabinet for certification or continuation as a disadvantaged business enterprise.

(2) "Approval" means that the applicant has been determined by the DBE Certification Committee to meet the disadvantaged business enterprise eligibility criteria as outlined in 49 C.F.R. Part 26.

(3) "Cabinet" means the Transportation Cabinet.

(4) "Certification" means the process whereby the Transportation Cabinet determines if an applicant meets the disadvantaged business enterprise criteria.

(5) "Decertified" means that a firm or business enterprise which has been certified by the Transportation Cabinet as a disadvantaged business enterprise has been determined to be ineligible and is, therefore, no longer entitled to the rights and privileges accorded to those who are certified by the Transportation Cabinet as a disadvantaged business enterprise.

(6) "Denial" means that the applicant does not meet disadvantaged business enterprise eligibility criteria as outlined in 49 C.F.R. Part 26 and as required by this administrative regulation.

(7) "Department" or "DOT" is defined by 49 C.F.R. 26.5.

(8) "Disadvantaged business enterprise" or "DBE" is defined by 49 C.F.R. 26.5.

(9) "Ineligibility complaint" means an action of a third party alleging that a firm is ineligible to participate in the DBE program.

(10) "Notice" means written notice from the Transportation Cabinet or Office of Minority Affairs delivered certified mail to the business address listed on the application form.

(11) "On-site inspection" means conducting an interview with principals of the firm at its primary place of business, reviewing business-related documents, and inspecting business facilities or equipment.

(12) "Program" is defined by 49 C.F.R. 26.5.

(13) "Small Business Administration" or "SBA" is defined by 49 C.F.R. 26.5.

(14) "Small business concern" is defined by 49 C.F.R. 26.5.

(15) "Socially and economically disadvantaged individual" is defined by 49 C.F.R. 26.5.

Section 2. Adoption of Governing Federal Material. (1) 49 C.F.R. Part 26, effective October 1, 2003, is adopted without change. This federal regulation governs the federal Department of Transportation's and the Kentucky Transportation Cabinet's relationship with and responsibility to

each other in the DBE Program. It further sets forth the basic requirements that the Transportation Cabinet shall impose on firms desiring certification.

(2) Kentucky's DBE Program shall be implemented in accordance with this administrative regulation and the Kentucky Transportation Cabinet DBE Program Plan as approved by the Federal Highway Administration.

Section 3. Application Process. (1)(a) Application for certification or continuation of certification as a DBE shall be pursuant to and governed by the procedures set forth in 49 C.F.R. Part 26 Subparts D and E.

(b) An application for certification shall be submitted on the Uniform Certification Application published by the Federal Highway Administration as Appendix F to 49 C.F.R. Part 26, effective June 16, 2003, and incorporated by reference in this administrative regulation.

(c) Each application form shall be completed in full.

(d) All documentation required by the application shall be attached to the completed application.

(e) The person signing the application shall be one (1) of the persons on whom the DBE status is based and shall identify that person's position with the firm or business enterprise applying for certification.

(f) The completed application shall be submitted to the Transportation Cabinet, Office of Minority Affairs.

(2) If the application is not complete, the Office of Minority Affairs shall return the application to the applicant firm requesting that the omitted information be included. An incomplete application shall not be considered by the Office of Minority Affairs. The Transportation Cabinet may request additional information in order to determine if an applicant firm should be certified. Failure of the applicant firm to provide the requested information shall be cause for the Transportation Cabinet to deny the application.

(3)(a) The Transportation Cabinet shall perform an on-site inspection of each new applicant located within the boundary of Kentucky.

(b) The Transportation Cabinet may certify out-of-state firms in accordance with 49 C.F.R. 26.81. All out-of-state firms shall first be certified in their home state prior to becoming certified by the Transportation Cabinet.

(c) Failure of the applicant firm to participate in the on-site inspection shall be sufficient cause for the Transportation Cabinet to deny the application.

Section 4. Evaluation of Application. The Transportation Cabinet shall use the eligibility standards set forth in 49 C.F.R. Part 26, Subpart D to determine the eligibility of a firm to be certified.

Section 5. DBE Certification Committee. (1) The DBE Certification Committee established in the Transportation Cabinet shall:

(a) Determine the eligibility of each applicant firm to be certified or renewed as a DBE; and

(b) If an issue regarding eligibility has arisen, determine whether a firm is eligible to remain certified as a DBE.

(2) The DBE Certification Committee shall be comprised of the following members:

(a) Executive Director, Office of Minority Affairs or a designee, as chair and as a nonvoting member;

(b) Deputy Secretary of the Transportation Cabinet or a designee;

(c) Director, Division of Construction or a designee;

(d) Director, Division of Highway Design or a designee;

(e) Audit Manager, Internal Audit Branch or a designee;

(f) Director, Division of Contract Procurement, or a designee;
(g) Director, Division of Professional Services, or a designee;
(h) Executive Director, Office of General Counsel or a designee, nonvoting member; and
(i) Kentucky Administrator of the Federal Highway Administration or a designee, ex officio, non-voting member.

(3) The Chairman of the DBE Certification Committee shall schedule meetings as needed.

(4) Four (4) of the voting members of the DBE Certification Committee shall constitute a quorum.

(5) (a) A simple majority of the voting members present at a meeting with a quorum shall be required to approve or deny an application or decertification submitted to the committee.

(b) A summary record of each meeting shall be maintained by the Office of Minority Affairs and presented for review and approval at the next meeting of the committee which has a quorum present.

(6) At least seven (7) working days prior to the meeting of the committee if an application or decertification is to be considered, the Office of Minority Affairs shall provide an agenda and a complete copy of the application and staff summary and recommendation to each member of the committee.

(7) The DBE Liaison Officer shall be present at committee meeting to answer questions and provide technical information.

(8) If requested by a committee member, the Executive Director of the Office of Minority Affairs shall have the technical staff member available to answer questions regarding an application or decertification.

(9) Consistent with the decision of the DBE Certification Committee, the Transportation Cabinet shall issue a written determination regarding the applicant's eligibility for certification within ninety (90) days of receipt of a completed original application if an ineligibility complaint as set forth in Section 10 of this administrative regulation has not been received.

Section 6. Certification of Applicant Firm. (1) If an application for certification as a DBE is approved by the Transportation Cabinet and an ineligibility complaint questioning the status of a firm from a third party as set forth in Section 10 of this administrative regulation is not received during the time the Transportation Cabinet is evaluating the application, the written notification required by Section 5(9) of this administrative regulation shall be the notice to the applicant firm of certification as a DBE.

(2) Certification as a DBE shall be valid for three (3) years from the date of notice of certification, except as provided by 49 C.F.R. 26.83(h) or Section 9 of this administrative regulation.

(3) Records of a certified firm shall be retained by the Office of Minority Affairs for a period of not less than three (3) years from the date of notice of certification.

(4) A certified DBE shall immediately notify the Office of Minority Affairs of any change of condition that may impact its certification status.

Section 7. Continuation. At least thirty (30) days prior to its certification continuation date, a certified DBE that intends to continue its certification shall submit a new Uniform Certification Application to the Transportation Cabinet, Office of Minority Affairs.

Section 8. Denial of Certification. (1) If an application for certification as a DBE is denied by the Transportation Cabinet, the notification required by Section 5(9) of this administrative regulation shall set forth the reasons for denial.

(2) A denial may be appealed to the Transportation Cabinet within thirty (30) days of the notice. The appeal shall be filed in accordance with Section 11 of this administrative regulation.

(3) An applicant firm shall not reapply for certification for one (1) year from the effective date of denial.

(4) The effective date of denial shall be one (1) of the following dates:

(a) If the denial is not appealed, the date the notice is received or delivery is attempted;

(b) If the denial is appealed and the denial is upheld, the date of the notice of final action on behalf of the Transportation Cabinet; or

(c) If the denial is appealed and the appellant withdraws, cancels, or otherwise suspends the appeal, the date of the withdrawal, cancellation, or suspension of the appeal.

Section 9. Decertification. (1) The Transportation Cabinet shall decertify a noncompliant DBE pursuant to the provisions of 49 C.F.R. 26.87.

(2) A firm may appeal a decision to decertify in accordance with Section 11 of this administrative regulation.

(3) Decertification shall be for a specific period of time as determined by the Transportation Cabinet but shall not be for a period of less than one (1) year.

Section 10. Ineligibility Complaints. (1)(a) A third party may file a written complaint alleging that a firm is ineligible to participate in the DBE program and specifying the alleged reasons why the firm is ineligible. An individual who has a current certification from the Small Business Administration issued pursuant to 15 U.S.C. 637 shall be rebuttably presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the Transportation Cabinet, Office of Minority Affairs as a DBE.

(b) The ineligibility complaint shall be made in writing to the Office of Minority Affairs.

(2) With its letter, the complaining third party shall include all information available to it which is relevant to a determination of whether the firm at issue is in fact socially and economically disadvantaged and a qualified DBE.

(3) The Transportation Cabinet shall determine, on the basis of the information provided by the ineligibility complaint and its subsequent investigation, if there is reason to believe that the firm at issue is in fact not socially and economically disadvantaged and a qualified DBE.

(4) If the Transportation Cabinet determines that there is not reason to believe that the firm at issue is not socially and economically disadvantaged and not qualified DBE, the cabinet shall so inform the complaining party and the firm in writing. This shall terminate the proceeding.

(5)(a) If the Transportation Cabinet determines that there is sufficient reason to believe that the firm at issue is not socially and economically disadvantaged and not a qualified DBE, the office shall notify the firm at issue that its status as a socially and economically disadvantaged enterprise has been challenged. The notice shall:

1. Summarize the grounds for the ineligibility complaint and the subsequent findings of the investigation; and

2. Require the firm at issue to provide to the Office of Minority Affairs, within thirty (30) days, information sufficient to evaluate its status as socially and economically disadvantaged and qualified DBE.

(b) Failure to provide the requested information within the time limit shall be cause for the DBE to be decertified or to be denied certification.

(6) If the social and economic disadvantaged status of a new applicant is challenged, the ineligibility complaint shall be reviewed and investigated prior to completion of the certification process.

(7) The Transportation Cabinet shall evaluate the information available and make a determination of the social and economic disadvantage of the firm at issue. The office shall notify both parties of this determination, setting forth the reasons for its proposal.

(8) In making the determinations called for in this section the Transportation Cabinet shall use the standards set forth in 49 C.F.R. 26.87.

(9) During the pendency of an ineligibility complaint filed under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.

(10) The decision of the Transportation Cabinet after an appeal and hearing before the Secretary of the Transportation Cabinet as set forth in Section 11 of this administrative regulation may be appealed to the United States Department of Transportation, by the adversely affected party to the proceeding under the procedures of 49 C.F.R. 26.89.

Section 11. Appeal and Hearing. (1) A party adversely affected by a decision of the Transportation Cabinet may appeal that decision within thirty (30) days of the notice of determination. The appeal shall be filed in writing with the Transportation Cabinet, Office of Minority Affairs, Executive Director, Station: W6-06-01, 200 Mero Street, Frankfort, Kentucky 40622. Alternatively, an appeal may be made directly to United States Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 5414, Washington, DC, 20590.

(2)(a) The Transportation Cabinet shall schedule the date for the hearing on the appeal not less than fifteen (15) nor more than thirty (30) days after the appeal is received unless otherwise agreed upon by the parties.

(b) If an appeal hearing is rescheduled beyond thirty (30) days from the date of the notification to deny certification at the request of the applicant firm and the firm is not currently certified, the firm's certification has expired, or the firm's request for recertification has been denied, the Office of Minority Affairs shall not approve as part of an established DBE goal any of the work contracted by the applicant.

(3) The Transportation Cabinet shall conduct the administrative hearing pursuant to the provisions of KRS Chapter 13B.

(4) The hearing officer's findings of fact shall be based on conditions existing at the time the on-site inspection or owner interview was conducted by the Transportation Cabinet. Changes made in an applicant's firm since the on-site inspection or owner interview shall not be considered by the Transportation Cabinet or a hearing examiner in determining the eligibility of the firm.

(5) An appeal from the Transportation Cabinet's final decision may be made to the United States Department of Transportation in accordance with the provisions of 49 C.F.R. 26.89.

Section 12. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) The Uniform Certification Application, 68 Fed. Reg. 35542, June 16, 2003; and

(b) Kentucky Transportation Cabinet DBE Program Plan as approved by the Federal Highway Administration, revised February 2002.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Transportation Cabinet, Office of Minority Affairs, Station W6-06-01, 200 Mero Street, Frankfort, Kentucky 40622, Monday through Friday, 8 a.m. to 4:30 p.m. (14 Ky.R. 1027; Am. 1203; eff. 1-4-88; 15 Ky.R. 534; eff. 10-4-88; 17 Ky.R. 1540; eff. 12-4-90; 19 Ky.R. 1130; 1532; eff. 1-4-93; 20 Ky.R. 2892; 3194; eff. 5-23-94; 21 Ky.R. 2521; eff. 6-1-95; 22 Ky.R. 1362; 1621; 1835; eff. 4-5-96; 24 Ky.R. 1559; 1880; eff. 2-19-98; 30 Ky.R. 2233; 2459; eff. 6-21-2004.)